STATE OF INDIANA

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INDIANA UTILITY REGULATORY COMMISSION

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COMPLAINT OF INDIANA BELL TELEPHONE COMPANY, INCORPORATED D/B/A SBC INDIANA FOR EXPEDITED REVIEW OF A DISPUTE WITH CERTAIN CLECS REGARDING ADOPTION OF AN AMENDMENT TO COMMISSION APPROVED INTERCONNECTION AGREEMENTS	)))))))	**CAUSE NO. 42749**

You are hereby notified that on this date the Presiding Officers in this Cause make the following Entry:

On November 9, 2004, Indiana Bell Telephone Company, Incorporated d/b/a SBC Indiana ("SBC Indiana" or "Complainant") filed a Complaint with the Indiana Utility Regulatory Commission ("Commission") against certain competitive local exchange carriers ("CLECs" or "Respondents") that have currently effective interconnection agreements with SBC Indiana. In substance, the Complaint seeks an Order by the Commission approving a proposed amendment to the interconnection agreements between SBC Indiana and Respondents that, according to SBC Indiana, would cause these interconnection agreements, which are currently not in conformance with applicable federal law, to conform with recent changes to governing federal law.

Six (6) Motions to Dismiss the Complaint have been filed by certain Respondents ("Movants"):

- On November 23, 2004, Qwest Communications Corporation ("Qwest") filed its *Motion of Qwest Communications Corporation to Dismiss.*
- On December 2, 2004, Cinergy Communications Company f/k/a Community Telephone Corporation filed its *Motion to Dismiss and Answer of Cinergy Communications Company f/k/a Community Telephone Corporation.*
- On December 2, 2004, Kentucky Data Link, Inc. filed its *Motion to Dismiss and Answer of Kentucky Data Link, Inc.*
- On December 2, 2004, eGIX Network Systems, Inc., FBN Indiana, Inc., First Communications, LLC, ICG Telecom Group, Inc., IDT America, Corp., KMC Data, LLC, KMC Telecom III, LLC, KMC Telecom V, Inc., MCI WorldCom Communications, Inc., MCImetro Access Transmission Services, LLC, Intermedia Communications, Inc., Midwest Telecom of America, Inc., New Edge Network, Inc., Nuvox Communications of Indiana, Inc., Talk America, Inc., Time

Warner Telecom of Indiana, L.P., XO Indiana, Inc., and Z- Tel Communications, Inc. ("eGIX Network Systems, *et al.*") filed their *Motion of Certain Joint CLECs to Dismiss Complaint.*

- On December 2, 2004, BullsEye Telecom, Inc., CityNet Indiana, LLC, CloseCall America, Inc., DSLnet Communications, LLC, Fiber Technologies Networks, L.L.C., McLeodUSA Telecommunications Services, Inc., PNG Telecommunications, Inc., and Sigecom, LLC ("BullsEye Telecom, *et al.*") filed their *Motion to Dismiss and Answer to SBC's Complaint.*

- On December 7, 2004, Access One, Inc. filed *Access One Inc.'s Motion to Dismiss SBC's Complaint.*

The Presiding Officers granted SBC Indiana's motion for an extension of time in which to respond to Qwest's Motion to Dismiss and *SBC Indiana's Consolidated Response to Motions to Dismiss* ("Response") was filed on December 15, 2004, in response to all of the above motions.

Certain Movants filed a total of three (3) Replies to *SBC Indiana's Consolidated Response to Motions to Dismiss*:

- *Qwest Communications Corporation Reply to the Consolidated Response of SBC Indiana to the Motions to Dismiss* was filed on December 22, 2004.

- On December 22, 2004, eGIX Network Systems, *et al.* filed their *Reply in Support of Motion of Certain Joint CLECs to Dismiss Complaint.*

- BullsEye Telecom, *et al.*, with the exception of CloseCall America, Inc., filed their *Reply in Support of Motion to Dismiss* on December 22, 2004.

SBC Indiana's Complaint asserts that the vacatur of major parts of the Federal Communications Commission's (FCC's) Triennial Review Order[1] in a decision by the U.S Court of Appeals for the D.C. Circuit,[2] as well as a recent interim rules order by the FCC,[3] issued in anticipation of permanent unbundling rules designed to fill the voids left in the wake of the USTA II decision, makes its Complaint ripe for Commission action. Complainant cites to language in both the TRO and the Interim Rules Order that

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[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("TRO").

[2] *United States Telecom Association v. Federal Communications Commission*, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II").

[3] Order and Notice of Proposed Rulemaking, *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No 04-313, CC Docket No. 01-338, FCC 04-179 (FCC rel. Aug. 20, 2004) ("Interim Rules Order").

anticipates and encourages prompt change of law amendments to interconnection agreements that would incorporate the FCC's changes to unbundling requirements.

Movants present several arguments in support of their Motions to Dismiss. The principle argument relied upon by all Movants is essentially that SBC Indiana has not complied with the contractual provisions of the parties' interconnection agreements governing change of law and dispute resolution, and that at least until such provisions have been invoked and exhausted, the Commission does not have authority or jurisdiction to determine this Complaint. A second argument expressed by some Movants is that the Commission is without authority to approve a generic amendment to be applicable en masse to interconnection agreements; that changes to interconnection agreements can occur only through consideration of the provisions of individual agreements. A third argument is that the Complaint is not ripe for determination; that it would be a waste of time and resources for the Commission and parties to address the Complaint while the FCC is engaged in writing permanent unbundling rules which could materially affect any appropriate change of law amendments.[4] Finally, some Movants raise the procedural argument that Commission jurisdiction for the relief requested lies in federal law (47 U.S.C § 251 and 252) and not in state law (I.C. §§ 8-1-2-54 and 58) as pled by SBC Indiana in its Complaint.

The first and second CLEC arguments noted above are interrelated. These arguments rely on the premise that each interconnection agreement, being the product of negotiation or arbitration, contains unique provisions. These arguments further rely on the contention that most, if not all, interconnection agreements contain some type of specific provisions describing a negotiation process designed to bring the agreement into conformance with any changes in law that occur after the agreement is executed, as well as a process to resolve disputes when negotiations to amend the agreement fail. The argument for dismissing the Complaint, therefore, is based on the assertion that SBC Indiana has not complied with agreed-upon contractual mechanisms for amending interconnections agreements to conform to changes in law, but has prematurely come directly to the Commission for change in law relief. The motion of eGIX Network Systems, *et al.* quotes specific provisions of the interconnection agreements between SBC Indiana and the MCI companies and Talk America, as examples of the specific negotiation and dispute resolution requirements, including specific timeframes, that the parties have agreed to follow in order to amend their interconnection agreements due to changes in law.

Complainant contends that the Respondents have had "ample opportunity" and notice to negotiate a change of law amendment to their interconnection agreements and, having failed to do so, Commission intervention is now appropriate. In fact, SBC Indiana contends that Movants' allegations that SBC Indiana has failed to negotiate its proposed amendment as fully as it might have, are false. SBC Indiana provides several specific examples of communications between it and certain Respondents to demonstrate that its efforts to engage Respondents in negotiations for change of law amendments have been

[4] The FCC adopted permanent unbundling rules on December 15, 2004, but only summaries, and not the text of the rules, have so far been issued.

futile. SBC Indiana also relies on the language in ¶¶ 22 and 23 of the Interim Rules Order that specifically does not prohibit SBC Indiana from initiating change of law proceedings that presume the absence of relevant unbundling requirements in anticipation that approved amendments to interconnection agreements will take effect quickly if the final rules, in fact, reflect such requirements.

In response to Movants' ripeness argument, Complainant contends that CLECs have already delayed in amending their interconnection agreements and that the issuance of final rules, which may result in more appeals, will provide opportunity for even more delay. With respect to the state authority pled in its Complaint, SBC Indiana claims that state law gives the Commission clear authority to consider issues related to interconnection agreements and that CLECs, while acknowledging Commission jurisdiction under federal law, are quibbling as to the manner in which jurisdiction has been invoked.

Pursuant to 47 U.S.C. § 252, the Commission has authority not only to approve or reject interconnection agreements, but also the authority to interpret and enforce interconnection agreements:

> While § 252 expressly gives state commissions authority to approve or reject interconnection agreements, the statute does not specifically say that this empowerment includes the interpretation and enforcement of interconnection agreements after their initial approval. We agree with all the parties before us, however, that a common sense reading of the statute leads to the conclusion that the authority to approve or reject agreements carries with it the authority to interpret agreements that have already been approved. We find further support for this conclusion in the recent decision of the Supreme Court in *Verizon Md., Inc. v. PSC*, 535 U.S. 635, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002), in the decisions of all other circuit courts to have considered the question, and in the determination of the Federal Communications Commission, ("FCC"), which is entitled to deference in the interpretation of the pertinent statute. See *In re Starpower*, 15 F.C.C.R. 11277, P 6, at 1129-80 (2000). . . . Other circuits have expressly recognized state commissions' authority to interpret the interconnection agreements at issue. . . . In *Illinois Bell Tel. Co. v. Worldcom Techs., Inc.*, 179 F.3d 566, 573 (7th Cir. 1999), the court stated that, in deciding a dispute between a CLEC and an ILEC over whether ISP calls were local traffic, the state commission "was doing what it is charged with doing in the Act and in the FCC ruling. It was determining what the parties intended under the agreements."[5]

We first take note of the language in the Interim Rules Order that the parties have relied upon in support of their respective positions. CLECs point to language in ¶17 that seems to discourage this type of complaint proceeding:

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[5] *BellSouth Telcoms., Inc. v. MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1274 (11th Cir. 2003).

> Moreover, whether competitors and incumbents would seek resolution of disputes arising from the operation of their change of law clauses here, in federal court, in state court, or at state public utility commissions, and what standards might be used to resolve such disputes, is a matter of speculation. What is certain, however, is that such litigation would be wasteful in light of the Commission's plan to adopt new permanent rules as soon as possible.

SBC Indiana, on the other hand, is more drawn to the provisions noted above in ¶¶ 22 and 23. The language in these paragraphs not only does not prohibit "change of law proceedings," but seems to encourage them:

> 22. In order to allow a speedy transition in the event we ultimately decline to unbundle switching, enterprise market loops, or dedicated transport, we expressly preserve incumbent LECs' contractual prerogatives to initiate change of law proceedings to the extent consistent with their governing interconnection agreements. To that end, we do not restrict such change-of-law proceedings from presuming an ultimate Commission holding relieving incumbent LECs of section 251 unbundling obligations with respect to some or all of these elements, but under any such presumption, the results of such proceedings must reflect the transitional structure set forth below. . . .
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> 23. . . . . Further, as described above, while we require incumbents to continue providing the specified elements at the June 15, 2004 rates, terms and conditions, we do *not* prohibit incumbents from initiating change of law proceedings that presume the absence of unbundling requirements for switching, enterprise market loops, and dedicated transport, so long as they reflect the transition regime set forth below, and provided that incumbents continue to comply with our interim approach until the earlier of (1) Federal Register publication of this Order or (2) the effective date of our forthcoming final unbundling rules. Thus, whatever alterations are approved or deemed approved by the relevant state commission may take effect quickly if our final rules in fact decline to require unbundling of the elements at issue, or if new unbundling rules are not in place by six months after Federal Register publication of this Order.

Our reading of the Interim Rules Order as a whole is that the FCC is encouraging carriers to initiate "change of law proceedings" at the contractual level between carriers, but is discouraging carriers, at least before final rules are in place, from seeking resolution of change of law disputes in court, before the FCC or before the Commission. To the extent, then, that the Complaint represents disputes between carriers with respect to change of law amendments, we conclude that the FCC is not, at this time, encouraging this type of complaint proceeding. That conclusion, however, does not resolve the issue before us; it does not provide sufficient reason to grant the Motions to Dismiss.

While SBC Indiana and all Respondents that have requested dismissal of the Complaint acknowledge that at some level the relief sought in the Complaint should be governed by the provisions of the relevant interconnection agreements, there does not seem to be agreement as to the extent to which the provisions of the interconnection agreements should govern the relief SBC Indiana seeks. The Movants are clear in their position that interconnection agreements are unique, individual, and different from each other, and that change of law amendments can only occur through invocation and application of each agreement's specific, relevant provisions. While Complainant does not take an opposite position, its arguments do not emphasize the individual nature of interconnection agreements, but emphasize the appropriateness of the relief it seeks in the contexts of efficiency, and need due to sufficient clarity of current conforming law.

Entry of a CLEC into the telecommunications market by way of negotiation or arbitration with an incumbent local exchange carrier ("ILEC") is at the foundation of the federal Telecommunications Act of 1996.[6] Although the Commission certainly supports the efficient resolution of any issue before it, we cannot overlook the individual, negotiated or arbitrated nature of interconnection agreements and, therefore, agree with Movants that invocation and application of remedies in interconnection agreements that provide procedural mechanisms to effect change of law amendments should typically precede seeking Commission intervention.

It follows that Commission approval of a generic amendment to modify a group of interconnection agreements, without the consent of all parties to the agreements, or without giving consideration to the intent of specific agreements, is not appropriate. This, in effect, was the holding in a case cited by Movants in which a state commission issued an order that amended interconnection agreements without consideration of the specific terms of the agreements:

> The CPUC's [California Public Utility Commission's] only authority over interstate traffic is its authority under 47 U.S.C. § 252 to approve new arbitrated interconnection agreements and to interpret existing ones according to their own terms. By promulgating a generic order binding on existing interconnection agreements without reference to a specific agreement or agreements, the CPUC acted contrary to the Act's requirement that interconnection agreements are binding on the parties, or, at the very least, it acted arbitrarily and capriciously in purporting to interpret "standard" interconnection agreements.[7]

SBC Indiana contends this holding is distinguishable from the relief sought in this proceeding in that it is not asking the Commission to impose substantive obligations on

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[6] Pub. L. No. 104-104, 110 Stat. 56. The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*

[7] *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1125-1126 (9th Cir. 2003).

the parties in a manner that would circumvent the interconnection agreements, but seeks to "conform" the language of existing interconnection agreements with governing law.

Similarly, we have also reviewed two other federal Appeals Court cases[8] cited by Movants for holding that interconnection agreements can only be amended through the Section 252 process; that an alternate process, such as a tariff-filing requirement, interferes with and is preempted by the federal procedure. SBC Indiana also disputes the applicability of these holdings to this proceeding, stating that it is not asking the Commission to override the Section 252 process, but is asking the Commission to "fulfill its role" under that process.

As noted above, we find sufficient interpretive authority from the courts and the FCC to conclude that 47 U.S.C. § 252 authorizes the Commission to not only approve or reject interconnection agreements and amendments thereto, but also to interpret and enforce the provisions of approved agreements. In this proceeding we are being asked by SBC Indiana to apply its proposed amendment to Respondents' interconnection agreements. In order to grant relief, we must first examine the provisions, if any, of the individual interconnection agreements as to their provisions for effecting change of law amendments and dispute resolution. If an interconnection agreement contains such provisions, then the terms of the agreement should control the process to effect an amendment.

We now consider the standard by which a Motion to dismiss must be reviewed. The Supreme Court of Indiana has stated:

> In reviewing a 12(B)(6) motion to dismiss, we look at the complaint in the light most favorable to the plaintiff, with every inference drawn in its favor, to determine if there is any set of allegations under which the plaintiff could be granted relief. *Indiana Civil Rights Comm'n v. Indianapolis Newspapers, Inc.*, 716 N.E.2d 943, 945 (Ind. 1999); *Ratliff v. Cohn*, 693 N.E.2d 530, 534 (Ind. 1998); *Cram v. Howell*, 680 N.E.2d 1096, 1096 (Ind. 1997). A dismissal under Trial Rule 12(B)(6) is improper unless it appears to a certainty that the plaintiff would not be entitled to relief under any set of facts. *Thomson Consumer Elecs., Inc. v. Wabash Valley Refuse Removal, Inc.*, 682 N.E.2d 792, 793 (Ind. 1997). Dismissals under Trial Rule 12(B)(6) are "rarely appropriate." *Obremski v. Henderson*, 497 N.E.2d 909, 910 (Ind. 1986).[9]

In light of this standard, the above discussion does not lead us to conclude that the Motions to Dismiss should be granted. With respect to the procedural argument raised by Movants, both 47 U.S.C. §§ 251 and 252 and our general state investigative authority found in I.C. §§ 8-1-2-54 and 58 have applicability to this proceeding. Movants argue

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[8] *Verizon North, Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002).
Wisconsin Bell, Inc. v. Bie, 340 F.3d 441 (7th Cir. 2003).

[9] *Indiana Civil Rights Comm. v. County Line Park, Inc.*, 738 N.E. 2d 1044 (Ind. 2000).

that SBC Indiana has not sufficiently invoked the appropriate federal law, yet the Complaint contains several acknowledgements of the applicability of the appropriate federal law, including the Complaint's prayer for relief. We find that Complainant has sufficiently invoked the appropriate legal authorities upon which its Complaint is based.

In regard to Movants' "ripeness" argument, we are not convinced that, absent a complete text of the permanent federal rules to review at this time, we cannot proceed with the Complaint. That is not to say, however, that we think the permanent rules should not be given consideration in this Cause. In fact, SBC Indiana's proposed amendment anticipates permanent rule requirements. As a practical matter, it is reasonable to assume that the text of the rules will be available in a timely manner for consideration in this proceeding.

As noted above, we agree with Movants' jurisdictional arguments that the specific negotiation and dispute resolution provisions of individual interconnection agreements are controlling with respect to change of law amendments and that generic Commission orders cannot be used to circumvent the federal process applicable to individual interconnection agreements. We do not find, however, that the Complaint necessarily seeks Commission intervention prior to fulfilling, or attempting to fulfill, relevant provisions of the interconnection agreements. As noted earlier, the Complaint, while not dwelling on, does not dispute the relevancy of change of law provisions in the interconnection agreements.

In ¶9 of the Complaint, SBC Indiana alleges: "For almost a year, SBC Indiana has attempted to engage the CLECs on an individual basis to amend their interconnection agreements *pursuant to their change in law provisions in those agreements*, but without success." (emphasis added) On page 22 of its Response to the Motions to Dismiss, SBC Indiana states:

> CLECs seek to stave off the inevitable by accusing SBC Indiana of failing or refusing to follow applicable change of law and dispute resolution provisions. But the truth of the matter is that, as alleged in the Complaint - which, again, must be taken as true for purposes of a motion to dismiss - SBC provided ample notice and opportunity for CLECs to amend their agreements pursuant to those provisions, but the CLECs failed to do so.

Complainant's argument is that it has made a reasonable effort to engage individual CLECs in the relevant change of law procedures pursuant to the interconnection agreements, but that CLECs have either ignored or rejected these overtures. SBC Indiana argues, therefore, that its only recourse is to seek Commission intervention.

Both SBC Indiana and Movants have provided examples of how Complainant has or has not attempted to invoke interconnection agreement procedures in an effort to effect the requested change of law amendment. For purposes of filing a Complaint sufficient to withstand the Motions to Dismiss, we should not expect Complainant to recite every fact

upon which its claim is based. SBC Indiana's Complaint alleges that it has properly invoked the relevant interconnection provisions to effect a change of law amendment; that the Respondents have refused to engage SBC Indiana in addressing these provisions; and that Commission intervention is now appropriate. Viewing its allegations in a light most favorable to SBC Indiana, we conclude that there could be a set of facts under which SBC Indiana would be entitled to relief. Only by examining the specific, relevant provisions of the individual interconnection agreements and the parties' actions (or inaction) with respect to those provisions, as well as the reasoning behind any action or inaction, can we determine if SBC Indiana is entitled to relief in the form of a Commission order to amend an interconnection agreement. Until we are able to review detailed evidence with respect to each interconnection agreement and the issues relevant to each agreement, it would not be appropriate to dismiss the Complaint as a whole or as to any individual Movant.

In addition, even though the Complaint asks that the proposed amendment be applied to all of Respondents' interconnection agreements, we are not bound by an "all or nothing" remedy. We have already found that an en masse application of a generic amendment, without considering the provisions of individual agreements, would be contrary to law. In fact, having determined that the interconnection agreements should be reviewed individually as to their terms and provisions regarding change of law amendments, it logically follows that granting or not granting relief would be made on an "interconnection agreement by interconnection agreement" basis. However, if Commission relief is determined to be appropriate, application of the same amendment language is certainly a possibility with respect to all or some groups of interconnection agreements.

We also note that the FCC provided direction in the TRO (¶¶700-706) for ILECs and CLECs to effect change of law amendments. It is possible that such direction will also be found in the permanent rules. Such direction could impact our approach to the Complaint, though we do not see this as reason to delay ruling on these Motions to Dismiss.

Finally, we hope the standard of review we contemplate for deciding the Complaint is clear. A review of individual interconnection agreements and the factual issues surrounding each agreement will be central to deciding whether it is appropriate for the Commission to impose a change of law amendment. To the extent Respondents find that a change in law amendment is appropriate, particularly following a complete review of the new federal rules, they are encouraged to pursue a negotiated resolution with SBC Indiana. SBC Indiana is also encouraged to pursue negotiated resolutions to its Complaint.

Based on the above analyses, the Presiding Officers find that the Complaint presents claims sufficient to withstand the Motions to Dismiss. Granting the Motions to Dismiss is not appropriate and, therefore, the six (6) Motions to Dismiss that are the subject of this Entry are DENIED.

IT IS SO ORDERED.

William G. Divine, Administrative Law Judge

Date: 1-21-05